



Commonwealth of Kentucky
Finance and Administration Cabinet
OFFICE OF THE SECRETARY
Room 383, Capitol Annex
702 Capital Avenue
Frankfort, KY 40601-3462
(502) 564-4240
Fax (502) 564-6785

Steven L. Beshear
Governor

Jonathan Miller
Secretary

July 12, 2010

No. 10-12

Jon D. Fuller
Commercial Sales Manager
Bachman Auto Group
9802 Bluegrass Parkway,
Louisville, KY 40299

RE: Determination of Protest: RFB 758-1000000484

Dear Mr. Fuller:

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of Bachman Auto Group ("BAG") relating to RFB 758-1000000484 (the "RFB") for 2010 Fleet Vehicles – Gas, Alternative Fuel, and Electric.

FACTUAL BACKGROUND

The Finance Cabinet, Office of the Controller, Office of Procurement Services ("OPS") issued the RFB on January 4, 2010. The RFB sought bids for Master Agreement for model year 2010 fleet vehicles. The RFB was modified five times to respond to vendor questions. The RFB closed on February 4, 2010.

One of the requested vehicles was the 2010 Chevrolet "Chevy" 1500 Silverado (CC10903) 2 wheel drive regular cab truck. The RFB requested a bid for the base model and 23 separate options. The RFB stated:

*******REALIZING THAT THE SPECIFICATION DATA IS SUBJECT TO CHANGE, SHOULD YOU FIND ANY INCONSISTENCIES, ERRORS, UNAVAILABILITY OF PRICING, CONCERNS, ISSUES, UNCLEAR ITEMS OR PACKAGES, PLEASE EMAIL THE COMMONWEALTH BUYER PRIOR TO THE BID CLOSING DATE FOR CLARIFICATION.***** Answering these issues prior to the bid closing is much better for all concerned than to deal with them after the bid closing time when very little can be done to clarify the situation.

Several generic points that will apply to ALL models on this Bid: Vendor shall add pricing or the following: ...

2. Where a model has an alternative fuel engine (Ethanol E-85), price it as a standard. List the gas model engine as an optional engine (as a charge or credit). This is so that an Agency or local government may request to order it that way. The same for those models that have a Hybrid system. **(Please refer to Q&A #9 from Modification #1 above for additional information and clarification on this item.)**

RFB, Section 15 p.45 of 93. A potential bidder asked the following question:

VENDOR QUESTION #9 -

Reference Section 15 - Fleet Vehicle Specifications and Requirements, #2 - Alternative Fuel Engines, what engine do we price as the standard engine?

COMMONWEALTH RESPONSE #9 -

The attached Vendor Information Sheets should have Specifications with an alternative fuel engine as standard. In these cases, price a gas or diesel as an optional engine at a cost or credit amount.

RFB, Modification #1, p. 21 of 93 (Modification #5). A Master Agreement was awarded to Herb Jones Chevrolet, Inc. for the 2010 Chevrolet "Chevy" 1500 Silverado (CC10903) 2 wheel drive regular cab truck on or about March 12, 2010.

Bachman Auto Group filed its written protest on March 30, 2010. In its protest, BAG contends that it should have been awarded a contract because it provided the lowest price bid. BAG bid a standard fuel engine. It asserts that the requirement that a bidder provide the price for a flex-fuel vehicle was ambiguous. On April 6, 2010, BAG filed a supplement to its protest based upon information contained in the Master agreement. BAG contends, based upon its interpretation of the RFB, that it was the lowest bidder. On April 7, 2010, OPS filed a response to the protest. On April 8, 2010, Herb Jones Chevrolet, Inc. filed its response. For the reasons contained herein, this protest is denied.

DETERMINATION

After a review of the solicitation, the applicable statutes and regulations, the protest and responses hereto, and other relevant information, the Secretary of the Finance Cabinet (the "Secretary") finds and determines as follows:

Any actual or prospective bidder who is aggrieved in connection with the solicitation or selection for award of a contract may file a protest with the Secretary of the Finance Cabinet. KRS 45A.285. BAG submitted a bid in response to the RFB. BAG, therefore, has standing to protest the award under KRS 45A.285.

A protest to an award must be made within two (2) calendar weeks within the date the protestor knew or should have known of the grounds for protest. KRS 45A.285. The contract was entered into on March 12, 2010. BAG filed its protest on March 30, 2010. The supplement was filed on April 6, 2010. The initial protest was filed more than two (2) calendar weeks after the contract was entered into. The initial protest is untimely. The supplement was also filed more than two (2) calendar weeks after the contract was entered into. The supplement is untimely.

In its protest, BAG alleges that the RFB was ambiguous concerning the requirement that the base model be a flex-fuel vehicle and that it submitted the lowest price. To the extent this protest is directed at the terms of the RFB, a protest to a solicitation should be filed *before* the protestor actually submits a bid or proposal. Once a party submits a bid or proposal to a solicitation and the bids are opened, the protestor then has waived all objections to the solicitation document not previously raised. See 4 C.F.R. §21.2(a)(1) ("Protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for receipt of initial proposals."); *Parsons Precision Products, Inc.*, Comp. Gen. B-249940, 92-2 CPD 431 ("a bidder who participates in a procurement through the point of bid opening without objection is deemed to have acquiesced in the agency's statement of the terms and conditions."); *RAM Engineering & Const., Inc. v. University of Louisville*, 127 S.W.3d 579, 583 (Ky. 2003) (The Supreme Court of Kentucky has found federal statutes and decisions to be persuasive in the procurement context.) The protest, therefore, has been waived.

Further, the Secretary finds that the RFB was not ambiguous with respect to whether a bidder was required to submit a bid for an alternative fuel base model engine. The RFB was clear that the Commonwealth sought bids for alternative fuel engines. RFB, Section 15 p.45 of 93; RFB, Modification #1, p. 21 of 93 (Modification #5).

Finally, BAG has not established prejudice. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996) ("[T]o prevail in a protest the protester must show not only a significant error in the procurement process, but also that the error prejudiced it."). To show prejudice, the protestor must demonstrate that there is a reasonable likelihood that, absent the error or violation of law, it would have been awarded the contract. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed.Cir.1999). BAG asserts that its bid was the lowest. However, BAG bid a *standard* fuel vehicle. The RFB sought bids for an *alternative* fuel vehicle. BAG's bid was non-responsive to the terms of the RFB and is not eligible for award.

Accordingly, upon review of the record, the protest of BAG is untimely, has been waived, and lacks merit. Further, the presumption of correctness in KRS 45A.280 applies and BAG has failed to provide sufficient evidence to overcome this presumption. Since there is no basis to overturn this procurement, the protest must be **DENIED**. Pursuant to KRS 45A.280:

The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

In accordance with KRS 45A.285 (4), the decision by the Secretary shall be final and conclusive.

Sincerely,

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a series of loops and a final flourish.

Jonathan Miller
Secretary
Finance and Administration Cabinet

cc: Michael B. Gustafson, OPS
Jeff T. Jones. Herb Jones Chevrolet, Inc.